UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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JOSE YGNACIO ABREU-LOPEZ, :

Petitioner, :

-against- :

JOHN ASHCROFT, et al., :

Respondents. :

- x

02 Civ. 6651 (AJP)

OPINION & ORDER

ANDREW J. PECK, United States Magistrate Judge:

Petitioner Jose Ygnacio Abreu-Lopez, represented by counsel, brings this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241, challenging a final administrative order of removal by the Board of Immigration Appeals ("BIA"). (Dkt. No. 1: Pet. ¶¶ 15-19.) An Immigration Judge ("IJ") ordered Abreu-Lopez deported after an in absentia hearing; the IJ and BIA both denied Abreu-Lopez's motion to reopen; and the BIA denied Abreu-Lopez's second motion to reopen the BIA's decision as untimely. (Pet. ¶¶ 15-19.)

The parties have consented to decision of this petition by a Magistrate Judge pursuant to 28 U.S.C. § 636(c). (Dkt. No. 5.)

For the reasons set forth below, the petition is **DENIED**.

FACTS

Petitioner Abreu-Lopez is a native and citizen of the Dominican Republic. (Dkt. No. 1: Pet. ¶ 9 & Ex. A; Dkt. No. 7: 9/13/02 Letter to Court from A.U.S.A. Megan Brackney, at 1.) Abreu-Lopez became a lawful permanent resident of the United States on December 8, 1992. (Pet. ¶ 9 & Ex. A; Brackney Letter at 1.)

On January 16, 1986, Abreu-Lopez pleaded guilty in New York Supreme Court, Bronx County, to criminal sale of a controlled substance and criminal possession of a controlled substance. (Pet. ¶ 10 & Ex. A; Brackney Letter at 1.)

Upon his return to the United States from a trip to the Dominican Republic, on or about November 2, 1997, Abreu-Lopez was served by the INS with a Notice to Appear, alleging that he was inadmissible and subject to removal pursuant to Section 212(a)(2)(A)(i)(II) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1182(c)(2)(A)(i)(II). (Pet. ¶¶ 12-13 & Exs. A-B; Brackney Letter at 1.)

Before the INS, Abreu-Lopez (through counsel) conceded that he was removable but claimed he was eligible for cancellation of removal. (Pet. Ex. C: 8/31/98 Letter to IJ at 2: "While [Abreu-Lopez] is certainly removable, we submit that he is not barred from seeking relief. . . . Although he has a controlled substance violation, this violation pre-dates any aggravated felony amendments to the INA. As such, he is eligible for cancellation of removal.")

The In Absentia Removal Order & Abreu-Lopez's First Motion to Reopen

A hearing was scheduled before the IJ for April 21, 1999 at 1:00 p.m. (See Pet. Ex. C: Campbell 5/4/99 Aff. in support of motion to reopen, ¶¶ 13-14.) On April 21, 1999, the IJ

ordered Abreu-Lopez removed, in absentia, when Abreu-Lopez failed to appear at the scheduled hearing. (Pet. ¶¶ 15-16 & Ex. D; Brackney Letter at 2.)

Abreu-Lopez moved to reopen his proceedings, arguing that his "delay at arriving at his hearing was due to no fault of his own but rather due to counsel's inability to leave a criminal court part in time to take petitioner to his hearing." (Pet. ¶ 16; Brackney Letter at 2.)[1/] Counsel for Abreu-Lopez argued to the IJ that this constituted "extraordinary circumstances" and asked that the

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[1/] Counsel's motion to the IJ to reopen further explained:

> 15. On April 21, 1999, due to unforeseen circumstances, both Members of the firm familiar with the respondent's case were out of the office. Jorge Guttlein, Esq. had been placed on trial in People v. Orlando Nieves, Bronx Supreme Court, Criminal Term Part 45, before the Honorable Judge Massaro since March 30, 1999 and was unavailable.
>
> 16. Although I normally do not attend to criminal court matters, because of the absences of Mr. Guttlein and the engagement in other matters of the remaining attorneys in our firm, at approximately, 11:30 a.m., I was required to attend a surety hearing in New York Supreme Court, Criminal Part 32, before the Honorable Judge Bradley. At approximately 12:00 p.m., I called the office and I asked Mr. Abreu-Lopez to wait for me at my office so that I could accompany him to [Immigration] Court.
>
> 17. At approximately, 12:30 p.m., I was instructed by Judge Bradley's clerk not to leave the courtroom until the matter was concluded. At approximately, 1:10 p.m., After the hearing, I left promptly to escort Mr. Abreu-Lopez and his family to Immigration Court. Upon our arrival, I was informed by the Trial Attorney that due to an adjournment of the case scheduled ahead of Mr. Abreu-Lopez, the respondent's case was called earlier than expected and the alien had been deported in absentia. Mr. Abreu-Lopez accompanied me to the Trial Attorney's office and witnessed my attempts to have the case recalled, all to no avail. We could not attempt to recall the case because the courtroom was closed.

(Pet. Ex. C: 3/4/99 Affidavit of Joyce Campbell, Esq., in Support of Motion to Reopen, ¶¶ 15-17.)

in absentia removal order be vacated and the proceeding reopened so that Abreu-Lopez could apply for § 212(c) relief from removal. (Pet. Ex. C: Campbell Aff. at 5-7.)

On September 19, 2000, the IJ found no "exceptional circumstance" and denied the motion to reopen, stating in full:

> The Respondent's motion is hereby denied, as the motion fails to establish that his failure to appear for his individual hearing was due to an exceptional circumstance beyond his control. Waiting for an attorney at his/her office does not constitute an exceptional circumstance, particularly in light of the fact that the Respondent had been in Court before.
>
> The Respondent was present in court on October 8, 1998, when he was personally served with a copy of the notice of hearing and was orally advised of the time and place of the hearing and of the consequences of his failure to appear for his hearing. The oral advisals were given to the Respondent in Spanish, the language he understands best. Furthermore, at that hearing the Respondent stated that he understood the above. The Respondent therefore had an obligation to appear in court at the appointed time.
>
> In arriving at a decision in this case, this Court also considered the following:
> 1) The hearing was scheduled for 1:00 p.m..
> 2) The Court did not proceed with the Respondent's case until 1:30 p.m., thereby affording the Respondent an additional half-hour to appear for his hearing.
> 3) Neither the Respondent nor his attorney's office contacted the Court to explain the reason for the delay and to ask the Court to further delay proceedings.
> 4) On the day of the hearing neither Counsel nor the Respondent made their presence known by contacting the clerk of the Court.
>
> In light of the above, the Respondent's motion is hereby denied.

(Pet. Ex. D: 9/19/00 IJ Decision, emphasis added; see also Pet. ¶ 17; Brackney Letter at 2.)

Abreu-Lopez timely appealed to the BIA, which denied his appeal on February 20, 2001. (Pet. ¶ 18 & Ex. E; see also Brackney Letter at 2.) The BIA found that exceptional circumstances were lacking:

> An order of removal issued following proceedings conducted in absentia pursuant to section 240(a)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(a)(5), may be rescinded only upon a motion to reopen which demonstrates that the alien failed to appear because of exceptional circumstances, because he or she did not receive proper notice of the time and place of the hearing, or because he or she was in federal or state custody and failed to appear through no fault of his or her own.
>
> In his motion to reopen, the respondent argued that he did not attend the hearing because of exceptional circumstances. He indicated that he was waiting for his attorney at his law office as of the scheduled time of the hearing on April 21, 1999. He acknowledged that he arrived at the hearing location late and that he did not even leave his attorney's office until ten minutes after the scheduled hearing time. The attorney has stated that he was delayed at a prior court room proceeding at a different location. In her decision, the Immigration Judge stated that she waited a half hour for the respondent before going forward with the hearing, that neither the respondent nor his attorney contacted the Immigration Court to explain the delay or to request a further postponement, and that the respondent and his attorney did not make their presence known to the Immigration Court clerk on the hearing date.
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> We concur with the Immigration Judge's decision of September 19, 2000. We have considered the respondent's generalized allegations on his Notice of Appeal. We likewise are not persuaded that the respondent has demonstrated that his failure to appear at his prior hearing was due to exceptional circumstances so as to warrant reopening. We thus find that the Immigration Judge's decision is to be upheld.
>
> Accordingly, the appeal is dismissed.

(Pet. Ex. E: 2/20/01 BIA Order at 1-2, emphasis added & citations omitted.)

Abreu-Lopez's Second Motion to Reopen

On August 20, 2001, counsel for Abreu-Lopez "submitted a Motion to Reopen to the BIA in light of [the Supreme Court's decision in] INS v. St. Cyr, 121 S. Ct. 2271 (2001). On October 26, 2001, the BIA denied the motion." (Pet. ¶ 19; see Pet. Ex. F; Brackney Letter at 2.) The BIA decision stated:

> This case was last before the Board on February 20, 2001, at which time we dismissed the respondent's appeal of an Immigration Judge's September 19, 2000, decision finding him removable in absentia. On August 20, 2001, the respondent submitted a motion to reopen proceedings in light of INS v. St. Cyr, 121 S. Ct. 2271 (2001). The Immigration and Naturalization Service has not responded to the motion. The motion is denied.
>
> The respondent's motion is untimely. Motions to reopen must be filed within 90 days of the date of the Board's decision. If the respondent's motion were treated as one to reconsider, it had to have been filed within 30 days of the Board's decision. Therefore, at the very latest, the respondent's motion was due at the Board on or before May 21, 2001, in order to be considered timely filed. The respondent's motion to reopen was not received by the Board until August 20, 2001. The respondent's motion is therefore untimely.
>
> Moreover, we note that the basis for a motion to reconsider is that the original decision was legally or factually defective in some regard. In his motion the respondent offers no arguments that the Board's in absentia decision was in any manner erroneous. As such, the respondent's motion is not correctly characterized as one to reconsider. Similarly, a motion to reopen may not be granted unless the evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing. The respondent's allegations regarding St. Cyr v. INS have no bearing on the in absentia issue that was the focus of the Board's decision. As such, the respondent's has not provided any material evidence, and reopening on that basis is not warranted. Accordingly, the motion is denied.

(Pet. Ex. F: 10/26/01 BIA Order, emphasis added & citations omitted.)

Abreu-Lopez concedes that the motion to reopen was untimely under INS regulations but claims that the motion could not have been filed until after the Supreme Court's St. Cyr decision on June 25, 2001. (Pet. ¶ 19.)[2/]

[2/] The Court notes that the Motion to Reopen nevertheless was filed approximately two months after the St. Cyr decision, with no explanation for that delay.

Abreu-Lopez concedes that IIRIRA eliminated his ability to appeal the BIA's decision directly to the Second Circuit. (Pet. ¶ 20.)

Abreu-Lopez's Present Habeas Petition & Prior Proceedings in This Court

On August 21, 2002, represented by the same law firm that had represented him before the INS, Abreu-Lopez brought a petition for a writ of habeas corpus before this Court pursuant to 28 U.S.C. § 2241. (Dkt. No. 1: Pet.) The petition did not explain the eight month delay from the BIA's October 26, 2001 denial of Abreu-Lopez's second motion to reopen to the filing of his habeas petition.

Abreu-Lopez's habeas petition asserts that the order of removal should be reversed or INS proceedings reopened because the "provisions of AEDPA and IIRIRA repealing discretionary relief from deportation did not apply retroactively to an alien who pleaded guilty to a crime prior to the enactment of AEDPA and IIRIRA." (Pet. ¶ 21 & Wherefore ¶ I.)[3/]

The petition also sought a stay of Abreu-Lopez's removal pending decision of his habeas petition. (Pet. ¶¶ 24-25 & Wherefore ¶ II.) By Order dated September 5, 2002, the Court ordered the INS to respond to the request for a stay on an expedited basis by September 13, 2002, and the Court entered a temporary stay of removal pending the INS response. (Dkt. No. 4: 9/5/02 Order.) By letter dated September 13, 2002, the INS opposed the stay and also responded to the merits of the petition. (Dkt. No. 7: 9/13/02 Brackney Letter to Court.) By Order dated September 24, 2002, this Court vacated its prior stay of removal. (Dkt. No. 6: 9/24/02 Order.)

[3/] The petition also asserts that "pursuant to Beharry v. Reno, 183 F. Supp. 2d 584 (E.D.N.Y. 2002), this Court should find petitioner eligible for section 212(h) hearing." (Pet. ¶ 22; see also Dkt. No. 2: Abreu-Lopez Br. at 7-8.) Because counsel for Abreu-Lopez never raised this issue before the INS, the Court will not consider this issue.

ANALYSIS

The Court has two preliminary observations. First, there is no doubt that petitioner Abreu-Lopez's problems are the result of poor advice and performance by his counsel, a point his counsel concedes. (Dkt. No. 2: Abreu-Lopez Br. at 6: "Petitioner should not be penalized . . . because of the poor advice of counsel, a person who is no longer employed with this firm."; accord, 10/7/02 Guttlein Letter to Court at 2.) Second, while it is troubling that someone who would have been eligible to be considered for relief from removal has been deprived of that opportunity because he was approximately one hour late to a hearing before the IJ, nevertheless, this Court's jurisdiction is not one of equitable review but is much more limited, as discussed below. As the Second Circuit stated in another immigration case:

> The description of the facts underlying this case is a chronicle of petitioners' highly unfortunate exercise of bad judgment or reliance on bad advice, the effects of which they now seek to overcome on appeal. But, as Judge Oakes, speaking for the Court, recently mused, "the immigration laws have a certain inexorability." We cannot help petitioners avoid the plain requirements of those laws or the consequences of their own behavior.

Mardones v. McElroy, 197 F.3d 619, 621 (2d Cir. 1999) (citation omitted).

I. THIS COURT HAS JURISDICTION OF A § 2241 HABEAS PETITION

The Supreme Court held in INS v. St. Cyr, 121 S. Ct. 2271, 2278-87 (2001), that neither the Antiterrorism and Effective Death Penalty Act ("AEDPA") nor the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") repealed general federal habeas corpus jurisdiction under 28 U.S.C. § 2241 to entertain challenges to INS removal decisions raising pure questions of law. Citing "the lack of a clear, unambiguous, and express statement of congressional

intent to preclude judicial consideration on habeas" of pure questions of law, coupled with the substantial constitutional questions such preclusion would raise, the Supreme Court concluded that § 2241 habeas jurisdiction was not repealed by AEDPA and IIRIRA. INS v. St. Cyr, 121 S. Ct. at 2287.[4/]

The Government concedes, as it must, this Court's § 2241 jurisdiction. (See Dkt. No. 7: 9/13/02 Brackney Letter at 3, citing Calcano-Martinez v. INS.)

II. THE TEMPORARY STAY OF REMOVAL

As noted above, Abreu-Lopez's petition (and supporting brief) sought a temporary stay of removal until the Court decided his habeas petition. (Dkt. No. 1: Pet. ¶¶ 24-25 & Wherefore ¶ II; Dkt. No. 2: Abreu-Lopez Br. at 4.) Abreu-Lopez asserted that if he were removed, he and his family would suffer irreparable harm, and that he "has a substantial likelihood of success on the merits of his application for relief pursuant to § 212(c) . . . and § 212(h)." (Pet. ¶¶ 24-25; accord, Abreu-Lopez Br. at 4.) Unfortunately, neither the petition nor his supporting brief contained any reference (much less discussion) of the legal standard applicable to a stay of removal.

The INS's opposition letter to the stay relied on INA § 242(f)(2), which provides that:

> Notwithstanding any other provision of law, no court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law.

[4/] Accord, e.g., Calcano-Martinez v. INS, 533 U.S. 348, 351-52, 121 S. Ct. 2268, 2270 (2001); see also, e.g., Bosquet v. INS, 00 Civ. 6152, 2001 WL 1029368 at *2 n.1 (S.D.N.Y. Sept. 6, 2001) (Peck, M.J.); Lawrence v. INS, 00 Civ. 2154, 2001 WL 818141 at *2 (S.D.N.Y. July 20, 2001) (Peck, M.J.); Merisier v. INS, 00 Civ. 0393, 2000 WL 1281243 at *4-7 (S.D.N.Y. Sept. 12, 2000) (reviewing pre-1996 law and changes made by AEDPA and IIRIRA); Ncube v. INS, 98 Civ. 0282, 1998 WL 842349 at *4-11 (S.D.N.Y. Dec. 2, 1998) (Peck, M.J.) (same).

8 U.S.C. § 1252(f)(2).

There is a paucity of case law as to the application of § 1252(f)(2) to a stay as opposed to a permanent injunction, and what case law exists is in conflict. Compare Weng v. U.S. Attorney General, 287 F.3d 1335, 1336-40 (11th Cir. 2002) (denying stay of removal pending appeal because petitioner did not satisfy the clear and convincing standard; holds that § 1252(f)(2) applies not only to injunctions but temporary stays of removal);[5/] with Maharaj v. Ashcroft, 295 F.3d 963, 965-66 (9th Cir. 2002) ("section 1252(f)(2) refers only to permanent injunctive relief and not to temporary relief such as an injunction pending appeal"); Bejjani v. INS, 271 F.3d 670, 687-89 (6th Cir. 2001) (stay of removal upheld under traditional preliminary injunction standard); Andreiu v. Ashcroft, 253 F.3d 477, 479 (9th Cir. 2001) (en banc court "conclude[s] that § 1252(f)(2) does not limit the power of federal courts to grant a stay of removal," but the traditional test for preliminary injunctive relief applies); Lal v. Reno, No. 99-3160, 221 F.3d 1338 (table), 2000 WL 831801 at *1 (7th Cir. June 26, 2000) ("We do not read the requirements for injunctive relief imposed by 8 U.S.C.

[5/] The following cases applied § 1252(f)(2) without discussing or analyzing whether it applies to a temporary stay. See Kourteva v. INS, 151 F. Supp. 2d 1126, 1128 (N.D. Cal. 2001) (motion for stay of removal denied under § 1252(f)(2)); Williams v. Reno, No. 00-71241, 2001 WL 85867 at *3 (E.D. Mich. Jan. 11, 2001) (stay denied under 1252(f)(2) because petitioner did not show clear and convincing evidence that his deportation was prohibited as a matter of law); Song v. INS, 82 F. Supp. 2d 1121, 1130, 1134 (C.D. Cal. 2000) ("By its terms, the IIRIRA standard [§ 1252(f)(2)] clearly applies because Petitioner seeks a stay of deportation."; stay of execution of petitioner's deportation granted during pendency of case based on finding of a constitutional violation); Hypolite v. Blackman, 57 F. Supp. 2d 128, 132, 134 (M.D. Pa. 1999) (motion for stay of deportation denied under § 1252(f)(2)); Naidoo v. INS, 39 F. Supp. 2d 755, 762 (W.D. La. 1999) ("court [was] expressly precluded from issuing a stay of the order of deportation" because petitioner did not make requisite showing under § 1252(f)(2)); Ozoanya v. Reno, 979 F. Supp. 447, 451 (W.D. La. 1997) (vacating stay issued by another district court under § 1252(f)(2) because petitioner did not show that stay of deportation was prohibited as a matter of law).

§ 1252(f)(2) as governing stays pending a decision on a timely petition for review."); Saini v. INS, 64 F. Supp. 2d 923, 929 (D. Ariz. 1999) (upholding application of preliminary injunction standard for stay of removal during habeas review).

As noted above, the Court here issued a stay while awaiting the INS's response to the stay request. The INS did not challenge the Court's power to issue such a temporary temporary stay, and the Court believes that whatever the proper interpretation of § 1252(f)(2), courts must have the inherent power to issue a stay at least until the Government responds to the request for a stay, in order to preserve the court's jurisdiction and obtain information from the Government as to whether a further stay should issue under the appropriate legal standard. The Court here vacated its stay on September 24, 2002 (Dkt. No. 6) after review of the INS's submission demonstrated that a further stay was not warranted under any applicable legal standard.

The Court here need not decide whether the Ninth or the Eleventh Circuit's interpretation of § 1252(f)(2) is correct. Under either the "clear and convincing" evidence standard of § 1252(f)(2), or the traditional standard for a preliminary injunction in this Circuit requiring a showing of a likelihood of success on the merits,[6/] Abreu-Lopez was not and is not entitled to a stay of removal since, as discussed in the following sections of this Opinion, Abreu-Lopez's petition fails on the merits.

[6/] E.g., Rodriguez v. DeBuono, 175 F.3d 227, 233 (2d Cir. 1999) (per curiam) (preliminary injunction requires showing of "irreparable harm" and "likelihood of success on the merits," and court should also consider the public interest); accord, e.g., No Spray Coalition, Inc. v. City of New York, 252 F.3d 148, 150 (2d Cir. 2001); Wright v. Giuliani, 230 F.3d 543, 547 (2d Cir. 2000); Latino Officers Ass'n v. City of New York, 196 F.3d 458, 462 (2d Cir. 1999), cert. denied, 528 U.S. 1159, 120 S. Ct. 1170 (2000); Carpenter Tech. Corp. v. City of Bridgeport, 180 F.3d 93, 98 (2d Cir. 1999); Forest City Daly Hous., Inc. v. Town of North Hempstead, 175 F.3d 144, 149 (2d Cir. 1999).

III. THE COURT LACKS § 2241 HABEAS JURISDICTION TO REVIEW THE BIA'S DISCRETIONARY DENIAL OF PETITIONER'S MOTION TO REOPEN

"There is no statutory provision for reopening of a deportation proceeding, and the authority for such motions derives solely from regulations promulgated by the Attorney General. . . . The granting of a motion to reopen is thus discretionary, and the Attorney General has 'broad discretion' to grant or deny such motions. . . . [T]he abuse-of-discretion standard applies to motions to reopen 'regardless of the underlying basis of the alien's request [for relief].'" INS v. Doherty, 502 U.S. 314, 322-23, 112 S. Ct. 719, 724-25 (1992) (citations omitted); see also, e.g., Ahmad v. United States INS, No. 01-4069, 39 Fed. Appx. 681, 681, 2002 WL 1560237 at *1 (2d Cir. July 16, 2002) ("We review the denial of the motion to reopen for abuse of discretion."); Zhao v. United States Dep't of Justice, 265 F.3d 83, 93 (2d Cir. 2001) (denial of motion to reopen "may be reversed only upon our finding that [the BIA] abused its discretion. An abuse of discretion may be found in those circumstances where the Board [of Immigration Appeals'] decision provides no rational explanation, inexplicably departs from established policies, is devoid of any reasoning, or contains only summary or conclusory statements; that is to say, where the Board has acted in an arbitrary or capricious manner.") (citations omitted); Iavorski v. United States INS, 232 F.3d 124, 128 (2d Cir. 2000) (BIA's "decision to deny a motion to reopen deportation proceedings is reviewed to determine 'whether the decision was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law.'") (quoting Fuentes-Argueta v. INS, 101 F.3d 867, 870 (2d Cir. 1996)); Thavarajah v. District Dir., No. 99-4120, 210 F.3d 355 (table), 2000 WL 427378 at *4 (2d Cir. April 19, 2000) ("'[T]he Attorney General has broad discretion to grant or deny such motions'" to reopen.) (quoting INS v. Doherty); Mardones v. McElroy, 197 F.3d 619, 624 (2d Cir. 1999) ("We review a decision by the

BIA denying a motion to reopen deportation proceedings for abuse of discretion."). Abreu-Lopez concedes that the "denial of a motion to reopen a deportation order entered in absentia is reviewed for abuse of discretion." (10/7/02 Guttlein Letter to Court at 1, citing INS v. Doherty.)

After the Supreme Court decisions in St. Cyr and companion cases holding that § 2241 habeas jurisdiction was not repealed by the AEDPA and IIRIRA, the Second Circuit has "held that federal courts retain [§ 2241] jurisdiction to review 'purely legal statutory and constitutional claims.'" Sol v. INS, 274 F.3d 648, 651 (2d Cir. 2001) (quoting Calcano-Martinez v. INS, 232 F.3d 328, 342 (2d Cir. 2000), aff'd, 533 U.S. 348, 121 S. Ct. 2268 (2001)), cert. denied, 122 S. Ct. 2624 (2002).[7/] Specifically, the Second Circuit held that "federal jurisdiction over § 2241 petitions does not extend to review of discretionary determinations by the IJ and the BIA." Sol v. INS, 274 F.3d at 651; see, e.g., Liu v. INS, 293 F.3d 36, 41 (2d Cir. 2002) ("'review of any discretionary decision made by the Attorney General'" is "plainly prohibit[ed]" by 8 U.S.C. 1252(g)); Kalkouli v. Ashcroft, 282 F.3d 202, 204 (2d Cir. 2002) ("We hold that the determination as to whether an alien is eligible for suspension of deportation by reason of extreme hardship is a discretionary decision . . . and therefore may not be appealed to this Court."); Darius v. INS, 01 Civ. 8015, 2002 WL 31119433 at *4 (S.D.N.Y. Sept. 24, 2002) ("district courts do not have jurisdiction to review discretionary determinations by an IJ or the BIA."); Inico v. Reno, No. 99-CV-4738, 2002 WL 31102696 at *1 (E.D.N.Y. Sept. 11, 2002) ("'[F]ederal jurisdiction over § 2241 petitions does not extend to review of discretionary determinations by the IJ and the BIA.'"); Reynoso v. Ashcroft,

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7/ See also, e.g., Soto v. Greiner, 00 Civ. 5986, 2001 WL 1029130 at *7-9 (S.D.N.Y. Sept. 27, 2001) (Peck, M.J.); Merisier v. INS, 00 Civ. 0393, 2000 WL 1281243 at *8-9 (S.D.N.Y. Sept. 12, 2000) (Peck, M.J.); Ncube v. INS District Directors & Agents, 98 Civ. 0282, 1998 WL 842349 at *9-11 (S.D.N.Y. Dec. 2, 1998) (Peck, M.J.).

01 Civ. 10840, 2002 WL 467576 at *2 (S.D.N.Y. Mar. 28, 2002) ("While habeas review of certain questions of law presented by deportation orders is proper . . . there is no jurisdiction to review discretionary determinations of the Attorney General.") (the Court notes that Abreu-Lopez's present counsel also was counsel for petitioner in Reynoso); Hernandez-Osoria v. Ashcroft, 01 Civ. 5545, 2002 WL 193574 at *5 (S.D.N.Y. Feb. 7, 2002) ("This Court does not have jurisdiction, however, to review the BIA's discretionary denial of a motion to reopen."); Atkinson v. INS, 01 Civ. 3432, 2001 WL 1223481 at *5 (S.D.N.Y. Oct. 15, 2001) ("[O]nce the BIA exercises discretion, its decisions are not reviewable by this court under § 2241. In order to be 'considerably more limited than on APA-style review,' the scope of habeas review under § 2241 must exclude all discretionary agency determinations. It is difficult to imagine any standard of review that would be considerably more limited than APA-style 'arbitrary, capricious [or] abuse of discretion' review, but yet still meaningful or different from no review at all. . . . § 2241 habeas corpus jurisdiction does not extend so far as to permit the review of discretionary administrative determinations.") (citations omitted).[8/]

[8/] See also, e.g., Garcia v. INS, 00 Civ. 1642, 2001 WL 863423 at *2 (S.D.N.Y. July 31, 2001) (Court lacks § 2241 jurisdiction to review merits of IJ discretionary decision to deny INA § 212(c) relief); Mezrioui v. INS, 154 F. Supp. 2d 274, 280 (D. Conn. 2001) ("federal courts have no such jurisdiction to review exercises of discretion, absent claims of unconstitutionality or legal error"); Akhtar v. Reno, 123 F. Supp. 2d 191, 196 (S.D.N.Y. 2000) (Court lacks § 2241 habeas jurisdiction to review IJ's and BIA's discretionary decision to deny INA § 212(c) relief); Avramenkov v. INS, 99 F. Supp. 2d 210, 213 (D. Conn. 2000) ("by enacting AEDPA and IIRIRA, Congress intended to insulate discretionary decisions of the Attorney General from judicial review. The same conclusion applies to the court's review of the Attorney General's discretionary decisions under the habeas statute, 28 U.S.C. § 2241.").

Since Abreu-Lopez's petition seeks § 2241 habeas review of the BIA's discretionary decision not to grant his (untimely) motion to reopen, this Court lacks jurisdiction over the petition. (The Court notes that Abreu-Lopez's submissions do not even address this jurisdictional question.)

IV. EVEN IF THE COURT HAD JURISDICTION TO REVIEW THE BIA'S DENIAL OF THE MOTION TO REOPEN, THE BIA'S DECISION WAS NOT AN ABUSE OF DISCRETION

Even if the Court had jurisdiction to review the BIA's denial of Abreu-Lopez's motion to reopen, the BIA did not abuse its discretion. As Judge Scheindlin recently stated:

> Assuming, arguendo, that jurisdiction exists here, the standard of review to be applied to the BIA's denial of motions to reopen is whether there was an abuse of discretion. The BIA's decision to deny Hernandez-Osoria's motion to reopen must be upheld "unless it was made without a rational explanation, inexplicably departed from established policies or rested on an impermissible basis such as invidious discrimination against a particular race or group."

Hernandez-Osoria v. Ashcroft, 01 Civ. 5545, 2002 WL 193574 at *5 (S.D.N.Y. Feb. 7, 2002) (citations omitted); see also, e.g., Arango-Aradondo v. INS, 13 F.3d 610, 613 (2d Cir. 1994) (pre-IIRIRA; "We will only find an abuse of discretion where the [INS's] decision was 'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis such as an invidious discrimination against a particular race or group.'"); Dhine v. Slattery, 3 F.3d 613, 619 (2d Cir. 1993) (pre-IIRIRA; "[W]e are obliged to uphold the INS's decision unless it is an abuse of discretion. We need only decide whether or not the INS considered the appropriate factors and came to a decision that has any rational basis.") (citations omitted).

The BIA's denial of Abreu-Lopez's second motion to reopen, on the ground that it was untimely, did not constitute an abuse of discretion. INS regulations require a motion to reopen to be filed within 90 days of the BIA's decision. 8 C.F.R. § 3.2(c)(2). The BIA decision sought to be

reopened was issued on February 26, 2001, but Abreu-Lopez's counsel did not submit a motion to reopen until August 20, 2001 (see page 5 above), almost 180 days later. Since the motion unquestionably was very late, the BIA's denial of the motion to reopen was not an abuse of discretion. See e.g., Ahmad v. United States INS, No. 01-4069, 39 Fed. Appx. 681, 682, 2002 WL 1560237 at *1 (2d Cir. July 16, 2002) (BIA did not abuse its discretion in denying as untimely motion to reopen filed more than three weeks after the 90-day deadline.); see also, e.g., Soumounou v. INS, No. 01-2192, 32 Fed. Appx. 630, 632, 2002 WL 481123 at *1 (3d Cir. Mar. 29, 2002) (no abuse of discretion in denying as untimely motion to reopen that was filed more than three months after the 90-day deadline); Moutafov v. INS, No. 00-71101, 32 Fed. Appx. 333, 336, 2002 WL 460369 at *3 (9th Cir. Mar. 12, 2002) (no abuse of discretion in denying motion to reopen as untimely when it was filed at least five months after actual notice of the BIA's final decision); Rodriguez-Rito v. Ashcroft, No. 00-71579, 17 Fed. Appx. 687, 687, 2001 WL 1003073 at *1 (9th Cir. Aug. 30, 2001) (no abuse of discretion in denying motion to reopen as untimely when it was filed eighteen months after the in absentia removal order); Avelar-Portillo v. INS, No. 99-1988, 205 F.3d 1344 (table), 1999 WL 1012842 at *1 (8th Cir. Nov. 8, 1999) (BIA did not abuse its discretion where alien's "motion to reopen based on exceptional circumstances was time-barred, as it was filed more than ten months after the order of deportation.").

Abreu-Lopez's counsel justifies the late filing of the motion to reopen on the ground that the Supreme Court did not decide St. Cyr until June 25, 2001. (Dkt. No. 1: Pet. ¶ 19; Dkt. No. 2: Abreu-Lopez Br. at 4, 6.) Counsel fails to explain the almost two month delay from the Supreme Court's June 25, 2001 St. Cyr decision to the August 20, 2001 filing of the motion to reopen. More

importantly, counsel does not explain why it did not file a timely motion to reopen based on the Second Circuit's decision in St. Cyr, which the Supreme Court ultimately affirmed. St. Cyr v. INS, 229 F.3d 406 (2d Cir. 2000), aff'd, INS v. St. Cyr, 121 S. Ct. 2271 (2001). For all these reasons, the BIA's decision to deny the untimely motion to reopen was not an abuse of discretion.

It is not clear, but counsel for Abreu-Lopez may also be challenging the IJ's and BIA's earlier decision not to reopen the in absentia removal order. (See pages 3-5 above.)

As the BIA correctly noted (see page 5 above), an in absentia removal order may be rescinded only if the alien demonstrates "exceptional circumstances" for the failure to appear. 8 U.S.C. § 1229a(b)(5)(C).[9/] The statute defines exceptional circumstances as follows:

> The term "exceptional circumstances" refers to exceptional circumstances (such as serious illness of the alien or serious illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances) beyond the control of the alien.

8 U.S.C. § 1229a(e)(1).

While somewhat harsh, the Court cannot say that the BIA abused its discretion in refusing to reopen because Abreu-Lopez did not demonstrate "exceptional circumstances." (See pages 4-5 above.) Indeed, prior federal court decisions have found that similar excuses to that offered by Abreu-Lopez did not constitute "exceptional circumstances." See, e.g., Simon v. INS, No.

[9/] That section provides that:

> Such an [in absentia removal] order may be rescinded only –
>
> (i) upon a motion to reopen filed within 180 days after the date of the order of removal if the alien demonstrates that the failure to appear was because of exceptional circumstances (as defined in subsection (e)(1) of this section), . . .

8 U.S.C. § 1229a(b)(5)(C)(i).

97-60713, 139 F.3d 908 (table), 1998 WL 80477 at *1 (9th Cir. Feb. 9, 1998) ("Because the [mis]calendaring of the date of the hearing was well within the control of Simon and her attorney, the BIA did not abuse its discretion by finding that the mistake was not an exceptional circumstance."); de Morales v. INS, 116 F.3d 145, 148-49 (5th Cir. 1997) ("The plain language of the statute indicates that [exceptional circumstances] is a difficult burden to meet"; "the BIA correctly concluded that the mechanical failure of the petitioner's car on the way to the hearing did not constitute exceptional circumstances within the meaning of the Act," especially where petitioner did not call or write to the IJ until after the in absentia removal order); Sharma v. INS, 89 F.3d 545, 547, 548 (9th Cir. 1996) ("The government may set a higher standard for a motion to reopen than it does for the original hearing because it has an interest in maintaining hearing dates that are set. . . ." Court upholds refusal of IJ and BIA to reopen where petitioners "arrived at the deportation hearing between 45 minutes and 1 hour late due to traffic congestion and trouble finding parking"; "The BIA correctly found that Petitioner's traffic difficulties do not qualify as exceptional circumstances beyond Petitioner's control."); Abasiri v. INS, No. 93-1633, 21 F.3d 419 (table), 1994 WL 96967 at *1-3 (1st Cir. Mar. 25, 1994) (BIA did not abuse its discretion when petitioner left before hearing commenced because counsel was not present and petitioner "made no effort to even notify the judge's chambers concerning the reason for his absence[,]" even though counsel had notified him of her withdrawal and warned him of the possible consequences of his failure to appear); Thomas v. INS, 976 F.2d 786, 788-90 (1st Cir. 1992) (BIA did not abuse its discretion in refusing to reopen in absentia deportation hearing where petitioner and counsel were a half hour late because of confusion whether petitioner was meeting counsel at counsel's office or at the hearing);

Webb v. Weiss, 69 F. Supp. 2d 335, 338-39 & n.4 (D. Conn. 1999) (no exceptional circumstances shown when petitioner's only explanation for failing to attend removal hearing was that his attorney instructed him not to attend).[10/]

While the Court might wish that the IJ and BIA had reached a more compassionate conclusion here, the Court cannot say under the case law that the BIA abused its discretion in finding that Abreu-Lopez did not establish exceptional circumstances so as to justify reopening the in absentia removal order.

[10/] Abreu-Lopez's "reply" papers (10/7/02 Guttlein Letter to Court) cite only two cases, which are distinguishable. Romero-Morales v. INS, 25 F.3d 125 (2d Cir. 1994), was a direct appeal to the Second Circuit from the BIA's decision, before enactment of the AEDPA and IIRIRA. The petitioner there had filed a motion for a change of venue, the IJ ordered him deported in absentia, and the Second Circuit remanded to the BIA principally because of "the insufficiency of the record" on the motion to reopen. 25 F.3d at 129. Hee, in contrast, the record is clear.

In the second case cited by Abreu-Lopez, Nazarova v. INS, 171 F.3d 478 (7th Cir. 1999), also a direct appeal from the BIA to the circuit court, the Seventh Circuit found an abuse of discretion where the INS gave the petitioner confusing and conflicting advice as to whether it would provide an interpreter, and she was late for her hearing because her interpreter failed to appear on time. 171 F.3d at 485. The dissent in Nazarova noted that in absentia removal orders in "cases as sympathetic as Nazarova's are routinely affirmed as unpublished orders." 171 F.3d at 488 (dissent, citing cases). The Court believes that, as the dissent there pointed out, the Seventh Circuit was substituting its view for that of the BIA, rather than truly finding an abuse of discretion. In any event, the Court cannot say that the BIA abused its discretion in Abreu-Lopez's case.

CONCLUSION

For the reasons set forth above, Abreu-Lopez's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 is **DENIED**. The Clerk of Court is directed to enter judgment for the INS and close this case.

SO ORDERED.

Dated: New York, New York
October 8, 2002

_____
Andrew J. Peck
United States Magistrate Judge

Copies to: Jorge D. Guttlein, Esq.
Megan L. Brackney, Esq.